IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	**CR-2127-2007**
	:	
SCOTT ERIC SWINN,	:	
Petitioner	:	**PCRA**

OPINION AND ORDER

On October 2, 2018 and June 12, 2018, Counsel for the Petitioner filed Motions to Withdraw as Counsel pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super.1988). After an independent review of the entire record, the Court agrees with Post-Conviction Relief Act (PCRA) Counsel and finds that Petitioner has failed to raise any meritorious issues in either his First or Second PCRA Petition, and his petitions will therefore dismissed.

Background

On April 11, 2008, Scott Swinn (Petitioner) pled guilty to Involuntary Deviate Sexual Intercourse.[1] On August 1, 2018, he received a sentence of ten (10) years minimum to twenty (20) years maximum in a State Correctional Institution. No subsequent appeal or motion for reconsideration was filed.

On July 10, 2009, Petitioner filed his First PCRA Petition and counsel was assigned. Due to a conflict Attorney James Protasio, Esq. was assigned on August 10, 2009. Despite an Order directing Attorney Protasio to file either an Amended PCRA or *Turner/Finley* letter, no such action was taken. This Court improperly dismissed the action without a filing on August 25, 2009. The Court did not take notice of this discrepancy until after Petitioner filed his second PCRA on September 19, 2017 and Attorney Ryan Gardner, Esq. was appointed on December 18,

[1] 18 Pa. C.S. § 3123(a)(7).

2017. Attorney Gardner was ordered by this Court to evaluate Petitioner's Second PCRA and to also evaluate Petitioner's original PCRA to determine if any claims of merit were improperly dismissed. Assigned counsel reviewed both of Petitioner's petitions, all documents pertaining to his guilty plea, and any other document regarding his case before sending Petitioner a *Turner/Finley* letter on June 12, 2018 for his Second PCRA Petition and September 28, 2018 for his original PCRA Petition and filing his Motions to Withdraw as Counsel on June 12, 2018 and October 2, 2018. After an independent review of the record and two additional PCRA conferences held on August 17, 2018 and October 26, 2018, this Court agrees with Attorney Gardner that Petitioner's PCRA Petitions failed to raise any meritorious issues.

First PCRA Petition

Whether Trial Counsel was Ineffective and Whether He Entered His Plea Knowingly Intelligently, and Voluntarily

Petitioner contends that his counsel did not advise him properly of the plea agreement he was entering and therefore his guilty plea not knowingly, intelligently, and voluntarily entered, amounting to ineffective assistance of counsel. Manifest injustice is required to withdraw guilty pleas which are requested after a sentence has been imposed. *Commonwealth v. Flick*, 802 A.2d 620, 623 (Pa. Super. 2002). Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly. *Commonwealth v. Persinger*, 615 A.2d 1305 (Pa. 1992). It does not matter if Petitioner is pleased with the outcome of his decision to plead guilty as long as he did so knowingly, voluntarily, and intelligently. *Commonwealth v. Yager*, 685 A.2d 1000, 1004 (Pa. Super. 1996). Defendant must demonstrate a "miscarriage of justice has taken place which no civilized society could tolerate, in order to be entitled to relief." *Commonwealth v. Allen*, 732 A.2d 582, 588 (Pa. 1999).

> The minimum inquiry required of a trial court must include the following six areas: (1) Does the defendant understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the defendant understand that he has a right to trial by jury? (4) Does the defendant understand that he is presumed innocent until he is found guilty? (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?

Commonwealth v. Young, 695 A.2d 414, 417 (Pa. Super. 1997). In *Yeomans*, the Superior Court further summarized:

> In order for a guilty plea to be constitutionally valid, the guilty plea colloquy must affirmatively show that the defendant understood what the plea connoted and its consequences. This determination is to be made by examining the totality of the circumstances surrounding the entry of the plea. Thus, even though there is an omission or defect in the guilty plea colloquy, a plea of guilty will not be deemed invalid if the circumstances surrounding the entry of the plea disclose that the defendant had a full understanding of the nature and consequences of his plea and that he knowingly and voluntarily decided to enter the plea.

Commonwealth v. Yoemans, 24 A.3d 1044 (Pa. Super. 2011) (citing *Commonwealth v. Fluharty*, 632 A.2d 312, 314 (Pa. Super. 1993)).

A review of the transcripts of Petitioner's guilty plea hearing confirms that he did in fact enter into his plea knowingly, voluntarily, and intelligently. Additionally it is worth noting that Petitioner's trial counsel had filed a Suppression Motion on his behalf that was scheduled for the same day he decided to enter a guilty plea. This Court informed Petitioner of his right to a jury trial, the elements of each charge to which he was pleading, and the maximum sentence and fine accompanying those charges. N.T. 4/11/2008, at 2-3. This Court stated that the Commonwealth must prove the elements of the crime beyond a reasonable doubt and that the Court does not have to accept the terms of the plea agreement. *Id.* at 2, 7. Defendant described in detail, on the record, how he had committed the crime:

> Q Okay. Then, sir, how do you wish to plead to the involuntary deviate sexual intercourse charge?

A Plead Guilty.
Q Okay can you tell me what you did?
A Um, I had some – taken a 14-year-old girl. We were camping in the woods behind my trailer court where I was living at the time.
Q And where was that?
A Temple Village Trailer Court on Lycoming Creek Road.
Q So Lycoming County, okay.
A And, um, we had – we had been talking about this off and on throughout the summer. Um, being, you know, um, sex or something like that. Um, and we had decided – she – she had okay'd it and we had decided to do it that day. And when I went back to the camp site cause they were camp – she was camping back there with some – with somebody else, I had went back there to start to gather wood for that nights campfire. And I – she was sitting on a wagon that I owned. I don't know if you have ever seen one, but it's a real old wooden wagon. It's all wood except for the – the wheels, the mounts and everything. I had had that back there for searing and she was sitting on that and when I had asked her if it was tine – you know, if it was okay that we go do it. And she said, yes. So I pulled her out into the back of the woods and had oral sex with her.
Q Okay, and by oral sex you have to be –
A I licked her vagina.
Q Okay. And how old were you at that time?
A 30-years-old, ma'am.
Q Okay. And she – and you would have known she was 14?
A Yes, ma'am.

Id. at 8-9.

In addition, Petitioner filled out a written guilty plea colloquy that he stated he understood and that he had "read each question like four, five, six times." *Id.* at 10. This colloquy highlighted many of these factors in greater detail, and Petitioner again stated "I admit that the charge against me is true I did have oral sex with a minor." Guilty Plea Colloquy 4/11/2008, at 5. According to Pennsylvania law, Petitioner's guilty plea was entered knowingly, voluntarily, and intelligently.

As for Petitioner's contention that the "terms of the plea, which was presented to [him], indicated 10 years; not the 10 to 20 years to which he was sentenced" is not accurate. Petitioner's First PCRA 07/10/2009, at 9. The minimum and maximum was presented at his guilty plea hearing:

Q Okay. All right, there's also a plea agreement for you to receive 10 years for – so what that would mean **is the minimum would be 10, the max will be at least 20**.
A Uh-huh.

Id. at 7.

There is no indication that Defendant was coerced into pleading guilty or that the guilty plea colloquy was improper, as he alleges. The record reflects that Petitioner's plea was intelligent, voluntary, and knowing entered and therefore his guilty plea will not be withdrawn or reconsidered. Therefore, upon review by Mr. Gardner and review and concurrence by this Court, Petitioner's original PCRA Petition was properly dismissed by the Court on August 25, 2009 as Petitioner's underlying claims were without merit.

Second PCRA Petitioner

Whether the Petitioner's Second PCRA Petition is untimely pursuant to 42 Pa.C.S. § 9545(b)

Petitioner's Second PCRA Petition is untimely. 42 Pa.C.S. 9545(b) requires that a PCRA Petition be filed within one (1) year of the date the judgment in a case becomes final, or else meet one of the timeliness exceptions under 42 Pa.C.S. § 9545(b)(1). The exceptions set forth in 42 Pa.C.S. § 9545(b)(1) are as follows:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

A PCRA petition raising one of these exceptions "shall be filed within [sixty] days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2). A petitioner must "affirmatively plead and prove" the exception. *Commonwealth v. Taylor*, 933 A.2d 1035, 1039 (Pa. Super. 2007).

> As such, when a PCRA is not filed within one year of the expiration of direct review, or not eligible for one of the exceptions, or entitled to one of the exceptions, but not filed within [sixty] days of the date that the claim could have been first brought, the trial court has no power to address the substantive merits of a petitioner's PCRA claims.

Id. at 1039.

Petitioner was sentenced on August 1, 2008, and his judgment of sentence became final thirty (30) days later on September 1, 2008. 42 Pa.C.S. § 9545(b)(3). Petitioner filed his Second PCRA Petition on September 19, 2017, which is well beyond one (1) year of the date the judgment became final. Therefore, Petitioner must fall within one of the exceptions listed in 42 Pa.C.S. § 9545(b)(1) for his PCRA Petition to be deemed timely and for this Court to have the jurisdiction to address the merits of his Second PCRA Petition.

Petitioner's basis for his Second PCRA Petition rests on the holding in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), which held retroactive application of SORNA requirements to convictions prior to the enactment of SORNA were unconstitutional. Petitioner is correct in his analysis and observation that his conviction would fall under the holding in *Muniz*. Since the holding in *Muniz* the Pennsylvania Superior Court has defined the applicability of *Muniz*. In *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674 (Pa. Super. 2017), the court held that the holding in *Muniz* applied to collateral review, but later distinguished that "because [petitioner's] PCRA petition is untimely (unlike the petition at issue in *Rivera–Figueroa*), he must demonstrate that the Pennsylvania Supreme Court has held that *Muniz* applies retroactively in

order to satisfy Section 9545(b)(1)(iii)." *Commonwealth v. Murphy*, 180 A.3d 402, 405-06 (Pa. Super. 2018). Since the Pennsylvania Supreme Court has yet to make a determination of whether *Muniz* applies retroactively, untimely PCRAs are not entitled to relief. Therefore, the Court finds that Petitioner's Second PCRA Petition is untimely and therefore cannot be afforded relief.

Conclusion

Based upon the foregoing, this Court finds no basis upon which to grant Petitioner's original PCRA Petition or his Second PCRA Petition. Additionally, the Court finds that no purpose would be served by conducting any further hearing. As such, no further hearing will be scheduled. Pursuant to Pennsylvania Rule of Criminal Procedure 907(1), the parties are hereby notified of this Court's intention to deny Petitioner's Second PCRA Petition and to ratify the dismissal of Petitioner's original PCRA Petition by Order dated August 25, 2009. Petitioner may respond to this proposed dismissal within twenty (20) days. If no response is received within that time period, the Court will enter an Order dismissing both Petitions.

ORDER

AND NOW, this _____ day of November, 2018, it is hereby ORDERED and DIRECTED as follows:

1. Petitioner is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petitions unless he files an objection to that dismissal within twenty (20) days of today's date.
2. The applications for leave to withdraw appearance filed June 12, 2018 and October 2, 2018, are hereby GRANTED and Ryan Gardner, Esq. may withdraw his appearance in the above captioned matter.

3. **Petitioner Scott Swinn will be notified at the address below through means of certified mail.**

By the Court,

Nancy L. Butts, President Judge

xc: DA
Ryan Gardner, Esq.
Scott Swinn
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